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No. 515

In the Supreme Court of the United States

OCTOBER TERM, 1957

A. W. HARTWIG AND JEFF TINGLE,
PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply Brief of Petitioners

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Reply Brief of Petitioners

I.

Counsel for the Government, in their brief herein just served and filed, and at the outset of their argument therein, state:—

> "1. (a) Petitioners' first and main argument is that the repeal of the 1946 Act by the 1947 Act extinguished the liability which had arisen under the earlier act. They argue that, since the 1947 Act provided specifically for the preservation of certain rights, the General Savings Statute, quoted *infra*, is

by necessary implication rendered inapplicable. This argument has been rejected by various lower federal courts."

With entire respect for such counsel, the various lower courts mentioned have not rejected the argument in question. On the contrary those courts do not mention, in the decisions cited, the contention made by Petitioners herein that, considering the 1947 Housing and Rent Act as a whole, and particularly the proviso therein, as must be done under cited decisions of this Court, it appears by plain implication therefrom, as a matter of law, that the said proviso sets forth the only rights left in effect under the Emergency Housing Act of 1946 by the said 1947 Act of repeal, and, hence, that the so-called general savings statute is inapplicable in the case at bar. For the convenience of this Court we quote again, and briefly, from the Hertz case (208 U.S. 452) which sets forth clearly the applicable law in the premises, to-wit:—

> "As the section of the Revised Statute in question (meaning the so-called general savings statute) has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested *either expressly or by necessary implication* (the italics are ours) in a subsequent enactment. But while this is true, the provisions of Section 13 (the said general savings statute) are to be treated as incorporated in and as a part of subsequent enactments, and therefore, under the general principles of construction requiring, if possible, that effect be given to all parts of a law, the section must be enforced unless, *either by express declaration or necessary implication, arising from the terms of the law as a whole,* (the italics are ours) it results that the legislative mind will be set at naught by giving effect to the provisions of Section 13 *****."

Then, continuing, this Court has the following to say in the Hertz case, to-wit:

> "The repealing Act here involved includes *a saving clause, and if it necessarily, or by clear implication* (the italics are ours), conflicts with the general rule declared in Section 13, the latest expression of the legislative will must prevail ****. The significance of Section 13 is therefore this: That if, prior to the repealing act, the defendants in error were under any liability or obligation **** that obligation or liability was not relieved by the mere repeal of that section, nor as a consequence of the *saving clause* (the italics are ours) in the repealing act, *unless the special character of that clause, by plain implication,* (the italics are ours) cuts down the scope and operation of the general rule in Section 13."

The lower courts whose decisions are cited by counsel for the Government do not consider or mention the doctrine of *implication* above mentioned but stand upon the ground only, contrary to the decisions of this Court, that *express language* in a repealing act is required in order to repeal pre-existing remedies under the repealed act and that otherwise the said general saving statute is operative and preserves those remedies. Nor do any of the other decisions cited by counsel for the Government operate to reject the said contention of the Petitioners herein.

Thus, to repeat to some extent, but briefly, the conclusions expressed in Petitioners' original brief herein, the law is that, giving effect to the 1947 Housing and Rent Act, as a whole, and considering what members of Congress must be charged with knowing when the 1947 Act was enacted into law, the plain *implication* of the proviso, which Congress put into the 1947 Act, is that

the proviso sets forth the only rights and remedies left in effect by the repealing act and that all other rights and remedies under the 1946 Act, existing before its repeal, ended June 30, 1947. To contend to the contrary would be to charge Congress with doing an absurd thing in putting the proviso into the said Act, which may not be done under settled rules of law. It follows, therefore, that the general saving statute has no application whatsoever in the case at bar and that the claimed rights, made the basis of the amended complaint of the Government herein, were extinguished by the 1947 Act and did not exist when this action was brought in 1948.

II.

Only one further matter will be discussed in this reply brief, and this by way of amplification of the concluding argument in Subdivision 3, pages 16 and 17, of Petitioners' initial brief herein.

First of all counsel for the Petitioners feels he should say to this Court that the quotation from Priorities Regulation 33 set forth upon page 16 of the Petitioners' initial brief herein was taken from the Federal Register bearing date, at Washington, D. C., of January 15, 1946, and with the understanding and belief of such counsel and their clients that the quoted clause was effective when the construction work was done by the Petitioners that is involved in this litigation. If, however, that clause was amended later and applies to the construction work done by the Petitioners, they were ignorant of that fact; but, nevertheless, it is submitted that the amendment—

set forth as paragraph 944.54(e) on page 12 of the brief of the Government herein—does not change the contention of the Petitioners as set forth in Subdivision 3 of their initial brief herein. In other words, the Petitioners contend that "written approval" was given by the F.H.A. for the changes made in construction, and, so contending, the Petitioners stand squarely upon Exhibit No. 20, set forth in the Book of Exhibits in the Court of Appeals for the Ninth Circuit in this case, and which is a part of the transcript of record. That exhibit appears upon page 378 of the said Book of Exhibits. As the Court will see, it is a written Compliance Inspection Report given to the Petitioners and is duly and appropriately signed by Federal Housing Administration officials. That exhibit recites that building improvements have been acceptably completed. It furthermore sets forth that the construction examiner, who signed the document, certifies he has carefully inspected the property on the date of his certificate and that he has reported all substantial variations from the approved drawings and description of materials, specific conditions of the commitment and applicable requirement; and then nothing whatsoever is set forth in this compliance construction report by way of variations from the approved drawings, etc. In other words, *the Compliance Inspection Report is a complete approval in writing* of the work the Petitioners have done under their contract herein with the F.H.A. Thus, there is no basis in the case at bar for the claim of the Government in its amended complaint

that the buildings involved were not constructed and completed as required. Upon this ground alone the Court of Appeals for the Ninth Circuit erred in the rendition of its judgment herein at which petition to this Court for a writ of certiorari is directed.

For all the reasons set forth herein, and in Petitioners' original brief filed in this Court, it is respectfully submitted that the petition for writ of certiorari herein should be granted.

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Attorney for Petitioners

November, 1957